Questions Presented.

(1) Whether a duly filed claim for refund of an overpayment of income taxes, in which specific grounds are stated, may be amended after the statutory period has expired, *but before the Commissioner of Internal Revenue has acted upon the original claim,* to state a new ground in support of the refund.

(2) Whether, in considering on their merits grounds and contentions set forth for the first time in an amendment to a timely claim for refund, which amendment was filed after the expiration of the statutory period but before the Commissioner acted upon the original claim, the Commissioner waived any defects in or objections to the claim for refund.

Note: The question as stated by petitioner is incomplete in that it omits the fact that the amendment to the claim for refund was filed before the original claim had been acted upon by the Commissioner.

The second question above was not expressly discussed in the opinion of the Circuit Court of Appeals.

Statutes Involved.

The statutes and regulations involved are contained in the appendix hereto.

Statement of Facts.

Appellant, a California corporation, was organized in 1907, and on October 3, 1907 acquired a lease of certain oil property. Oil was discovered and thereafter, including the entire year 1919, the only business engaged in by appellant was the production and disposition of oil from this property [Stipulation of Facts VIII, R. 49; Findings of Fact VII, R. 66.]

On April 10, 1911 appellant, by its Board of Directors, duly adopted a resolution providing in effect that all oil produced by appellant after January 1, 1911 should be assigned to appellant's lessors under the lease to the extent of their royalty interests and to appellant's stockholders to the extent of their holdings of stock, *pro rata,* in kind, so long as the stockholders should pay calls for money necessary to cover all expenses of appellant. That resolution remained in full force and effect at all times subsequent to April 10, 1911 to and including the entire year 1919 [Findings of Fact VIII, R. 66; Stipulation of Facts IX, R. 49, 50.]

Thereafter appellant distributed the oil in kind, as it was produced, to its lessors and stockholders in accordance with their respective interests as provided in said resolution [Findings of Fact VIII, R. 66.] As all the oil produced by appellant was distributed in kind it realized no income therefrom [Conclusions of Law IV, R. 68] and as its only activity was the production of oil appellant had no taxable income whatsoever during the year 1919.

Due to a misconception of the law, appellant believed that it realized income from the production of the oil and in its income and excess profits tax return for the year 1919 appellant reported net income in the amount of $16,928.61 and a tax liability for said year of $2,072.68 which tax was paid during the year 1920 [R. 53]. Thereafter the Commissioner of Internal Revenue determined and assessed an additional tax of $3,105.65 against appellant for said year [Findings of Fact III, R. 54]. Appellant paid said additional tax of $3,105.65 on April 3, 1925 [Findings of Fact IV, R. 54].

On March 30, 1929 appellant filed with the Collector of Internal Revenue at Los Angeles, California, its claim for refund on Form 843 of income and excess profits taxes overpaid by it for the year 1919 in the amount of $3,105.65 [Findings of Fact V, R. 54]. In said claim for refund appellant contended (1) that it was entitled to an additional deduction for the amortization of the cost of a certain drilling contract, and (2) that its invested capital as determined by the Commissioner of Internal Revenue for excess profits tax purposes was understated by reason of the failure to include therein the unrecovered value of the said drilling contract. Appellant stated the facts in support of these contentions [Findings of Fact V, R. 54-62]. On May 31, 1929, while the claim for refund of March 30, 1929 was being considered by the Commissioner of Internal Revenue, appellant filed a duly sworn statement entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919". In said statement of May 31, 1929 appellant set forth as an additional reason in support of its claim for refund that

because of the distribution of its oil in kind appellant had realized no taxable income during the year 1919 and set forth the additional facts in support of this additional contention [Findings of Fact VI, R. 62-65].

The Commissioner of Internal Revenue undertook to treat the supplemental statement of May 31, 1929 as a valid amendment of appellant's original claim for refund filed on March 30, 1929 and undertook to consider on their merits the contentions and grounds advanced by appellant in said supplemental statement of May 31, 1929 [Findings of Fact VI, R. 66], and on August 12, 1929 the Commissioner sent to appellant a letter notifying appellant that its claim for refund would be rejected. In regard to appellant's contention that it realized no taxable income in 1919 the Commissioner stated in said letter of August 12, 1929—"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation" [Findings of Fact VI, R. 66; Stipulation of Facts, V, R. 48; Complaint, Ex. D, R. 37].

On November 13, 1929 the Commissioner of Internal Revenue sent to appellant another letter notifying appellant that its claim would be rejected. In said letter of November 13, 1929 the Commisisoner stated that the supplemental statement of May 31, 1929 would not be considered as an amendment to the original claim as it was filed after the expiration of the statutory period of limitation [Stipulation of Facts VI, R. 48; Complaint, Ex.

E, R. 39]. The Commissioner formally rejected appellant's claim on November 21, 1929 [Stipulation of Facts VII, R. 48].

Appellant filed suit in the United States District Court for the Southern District of California for the recovery of said overpayment of taxes for the year 1919. In its complaint appellant alleged as grounds for recovery the facts and contentions contained in its original claim of March 30, 1929 and those contained in its supplemental statement of May 31, 1929 [R. 7-42].

The District Court concluded that appellant realized no taxable income during the year 1919 from the production and distribution of oil [Conclusions of Law IV, R. 68] but further concluded that the supplemental statement of May 31, 1929 did not constitute an amendment to appellant's original claim for refund filed on March 30, 1929 [Conclusions of Law I, R. 67], and since said supplemental statement was filed after the expiration of the statutory period, and since the grounds upon which recovery could be based were first stated in the supplemental statement, appellant was not entitled to recover [Conclusions of Law II, III and V, R. 67 and 68]. Upon these conclusions judgment was rendered for appellee.

The Circuit Court of Appeals determined that the amendment to the claim for refund filed May 31, 1929 was a proper amendment to the original claim for refund filed March 30, 1929 and reversed the judgment of the District Court [R. 88].

ARGUMENT.

I.

The Decision of the Circuit Court of Appeals Herein Is Not in Conflict With Any Decisions of Any Other Circuit Court of Appeals or With Any Decision of This Court.

The petitioner contends that the decision of the Circuit Court of Appeals herein is in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *United States v. Richards* (1935), 79 Fed. (2d) 797, certiorari denied, 297 U. S. 718, and *Bryant Paper Co. v. Holden* (1932), 63 Fed. (2d) 370, certiorari denied, 290 U. S. 631, and with the decision of the Circuit Court of Appeals for the Second Circuit in *New York Trust Company v. United States* (1937), 87 Fed. (2d) 889, certiorari denied June 1, 1937, and also with the decision of this court in *United States v. Henry Prentiss & Co.*, (1933), 288 U. S. 73. An examination of the decisions referred to discloses that each is distinguishable on the facts and is based upon a different principle of law.

In *United States v. Richards, supra,* the court determined that the original claim for refund had been rejected *before* the amended claim was filed. Furthermore, the original claim concerned the allocation of dividends received by the taxpayer and required examination of the books of the dividend-paying corporations, and the amended claim concerned the deduction of excess profits taxes paid by a partnership of which the taxpayer was a member and required examination of the affairs and books of the partnership which was a separate entity and in no way connected with the corporations. In its decision the Circuit Court determined that the amendment was

not proper for the reason that the amendment required the examination of entirely new fields and the affairs of a new and separate entity. In the case at bar both the original claim and the amendment concerned the income of the taxpayer only and in no way required examination of the books or the affairs of any other entity.

In *Bryant Paper Co. v. Holden, supra,* the court determined that the amended claim was an independent demand which did not seek to relate itself to the original claim. In *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290, certiorari denied, 293 U. S. 599, the Court of Claims, after considering facts almost identical with the facts presented in the case at bar, held that the amendment was timely. In its opinion the Court of Claims discusses and distinguishes *Bryant Paper Co. v. Holden, supra.* This court denied certiorari in *Youngstown Sheet & Tube Co. v. United States* (293 U. S. 599).

New York Trust Company v. United States, supra is very similar to *United States v. Richards, supra.* In that case also the court determined that the original claim had been rejected *before* the amended claim was filed. The amended claim also required an examination of the records of another taxpayer. The court followed *United States v. Richards, supra,* and stated (87 Fed. (2d) 891):

> "When the amendment requires examination of the records of another taxpayer, we think that inquiry is forced into paths too far removed from those to which the original claim directed it. We agree with the view expressed by the Sixth Circuit in the Richards Case."

In its opinion the court suggests that *United States v. Richards, supra,* and *Youngstown Sheet & Tube Co. v. United States, supra,* are distinguishable.

In *United States v. Henry Prentiss Co.* (1933), 288 U. S. 73, the taxpayer attempted to convert a request for discretionary relief into a claim of right under the statute after the statutory period had expired and after the taxpayer had waived and abandoned any claims under the statute. In the case at bar there was never at any time any request for discretionary relief. The original claim was based on statutory grounds and the amendment merely added another statutory ground. There was no inconsistency between the grounds advanced in the original claim and those advanced in the amendment. The original claim asked for additional deductions for amortization and in the amended claim it was contended that respondent realized no taxable income during the year. It is true that if respondent had no income it could not use the deductions but it might nevertheless be entitled to them. There are many instances in which a taxpayer cannot use deductions to which he is entitled merely because he has no income against which to use them but there is no inconsistency between a claim for deductions and a claim that the taxpayer has no income. A taxpayer's contention that he had no income does not constitute an abandonment of a concurrent alternative claim that he was entitled to additional deductions if it is determined that he did have income. In the case at bar there was no abandonment of the grounds of the first claim when the amendment was filed. Respondent continued to urge both contentions before the Commissioner, both contentions were considered by the Commissioner in passing on the claim, and both contentions were alleged by respondent in its complaint in the District Court.

It is submitted that the decision of the Circuit Court of Appeals herein is not in conflict with any of the above decisions.

II.

The Decision of the Circuit Court Herein Is in Accord With the Decisions of This Court and of Other Courts on the Issues Presented.

The general issue presented in the case at bar is not a new one; it has been considered in a series of decisions by this court.

United States v. Memphis Cotton Oil Co. (1933), 288 U. S. 62;

United States v. Henry Prentiss Co. (1933), 288 U. S. 73;

United States v. Factors & Finance Co. (1933), 288 U. S. 89;

Bemis Bros. Bag Co. v. U. S. (1933), 289 U. S. 28;

George Moore Ice Cream Co. v. Rose (1933), 289 U. S. 373.

In the above cases this court has considered and passed upon the various phases of the question of when and to what extent a timely claim for refund may be amended after the time for filing a new claim has expired. In the opinions rendered in the above cases this court has discussed the problem at length and has stated the rules for the determination of when and under what circumstances an amendment is proper and timely.

The exact issue presented in this case was presented to the Court of Claims in *Youngstown Sheet & Tube Co.*

v. United States (Ct. Cl. 1934), 7 Fed. Supp. 290. In its opinion in that case the Court of Claims stated the question as follows:

> "This brings us to the crux of the case. May a claim which assigns a specific ground for recovery (here deductions from gross income) be amended or supplemented, after the statute has run for filing a new claim, but before the Commissioner has finally acted on the original claim, in order to permit a taxpayer to claim additional deductions and thereby secure a greater refund than would have been permitted on account of the specific ground assigned in the original claim?"

After carefully reviewing the decisions of this court, the Court of Claims decided that the issue was within the rules announced by this court and was timely and proper. Certiorari was denied (293 U. S. 599).

On similar facts the Court of Claims reached the same conclusion in *Con. P. Curran Printing Co. v. United States* (1936), 15 Fed. Supp. 153, certiorari denied April 26, 1937.

It is submitted that the Circuit Court of Appeals in its decision herein and the Court of Claims in its decision in *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290, correctly concluded that the issue presented is determined by the decision of this court in *United States v. Memphis Cotton Oil Co.* (1933), 288 U. S. 62, and the other decisions cited above.

III.

No Important Federal Question Is Presented.

As stated above, the various phases of the questions presented in this petition have been exhaustively considered and passed upon by this court in previous decisions. There is no more urgent or important federal question presented here than was presented in *Youngstown Sheet & Tube Co. v. United States* (Ct. Cl. 1934), 7 Fed. Supp. 290; *United States v. Richards* (1935), 79 Fed. (2d) 797, and *New York Trust Company v. United States* (1937), 87 Fed. (2d) 889. Also if *United States v. Richards, supra* and *New York Trust Co. v. United States, supra* are in conflict with the decision herein, they were likewise in conflict with the decision in *Youngstown Sheet & Tube Co. v. United States, supra.* Yet certiorari was denied in those cases.

Petitioner suggests that a new problem is presented by the change in the regulations resulting from Treasury Decision 4265—VIII-1 Cum. Bull. p. 110. It is submitted that the decisions of this court in regard to the issues here presented in the cases above referred to were not based upon the peculiar wording of the regulations prior to the amendment of Treasury Decision 4265 and that the principles announced in the decisions of this court are fully applicable to the regulations as amended by Treasury Decision 4265.

IV.

The Decision of the Circuit Court of Appeals Herein Can Be Sustained on Another Ground.

The decision of the Circuit Court of Appeals herein can be sustained upon a ground not expressly discussed in its opinion. The record in this case shows that the Commissioner of Internal Revenue considered on their merits the contentions and claims advanced by the taxpayer in its amended claim [R. 66,; R. 37.] In his original notice of rejection the Commissioner made no mention of the fact that the amended claim was filed after the time had expired for the filing of a new claim but treated the amended claim as a proper and timely amendment and considered it on its merits [R. 66, R. 37].

The object and purpose of a claim for refund is to give the Commissioner of Internal Revenue an opportunity to correct the error alleged before resort is had to the courts. The requirements prescribed by the regulations in regard to the form and content of claims for refund are for the purpose of advising the Commissioner of the facts and the contentions of the taxpayer and to facilitate the investigation of the claim. If the Commissioner is fully advised in regard to the facts and contentions without strict compliance by the taxpayer with the formal requirements of the regulations the purpose of the regulations has nevertheless been fulfilled and the defects in

the claim may be waived by the Commissioner, either expressly or by consideration of the claim on its merits.

Tucker v. Alexander (1927), 275 U. S. 228;

United States v. Memphis Cotton Oil Co. (1933), 288 U. S. 62;

United States v. Humble Oil & Ref. Co. (C. C. A. 5, 1934), 69 Fed. (2d) 214;

Reynolds v. McMurray (C. C. A. 10, 1935), 77 Fed. (2d) 740;

United States Paper Exports Ass'n, v. Bowers (D. C. N. Y., 1934), 6 Fed. Supp. 735;

Weihman v. United States (D. C. Pa., 1933), 4 Fed. Supp. 155.

In the case at bar the Commissioner was not only fully advised in regard to the facts and the taxpayer's contentions before he acted upon the claim but he also considered all the contentions on their merits. It was not until after the contentions had been fully considered that the Commissioner raised any question in regard to the sufficiency of the original claim or the timeliness of the amendment thereto. It is submitted that in considering on their merits the contentions advanced in the amendment to the claim for refund the Commissioner waived compliance of the formal requirements of the regulations and waived any defects which may have existed in the claim for refund.

Conclusion.

In conclusion respondent submits:

(1) That the decision of the Circuit Court of Appeals herein is not in conflict with any decision of any other Circuit Court or of this court and is in entire accord with the decisions of this court and with the decisions of the lower courts on the questions here presented;

(2) That there is no important federal question involved which has not been fully considered in decisions of this court heretofore rendered;

(3) That upon the facts in this case the decision of the Circuit Court of Appeals is proper and can be sustained upon another ground not expressly discussed in the opinion of the court.

WHEREFORE, it is submitted that the petition should be denied.

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APPENDIX.

Revenue Act of 1926—Section 1113.

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

Revenue Act of 1926—Section 284(a) and (b).

Sec. 284(a). Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section:

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Regulations 74, Article 1254, as amended by T. D. 4265 (Cum. Bull. VIII-1, p. 110).

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.